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July 31, 2007

VIA ECF & FEDEX

Hon. Michael L. Orenstein
United States District Court
Eastern District of New York
Long Island Courthouse
100 Federal Plaza
Central Islip, NY 11722-4438

Re: S&L Vitamins, Inc. v. Australian Gold, Inc.
Cause No. 2:05-CV-1217 (JS) (MLO)

Dear Magistrate Judge Orenstein:

We represent Australian Gold, Inc. in the above-captioned matter. This letter concerns an issue that we intend to raise at the status conference set for August 2, 2007.

Throughout this litigation, S&L Vitamins has denied purchasing Australian Gold tanning lotions and products ("Products") from Australian Gold's authorized distributors. Instead, it claims that it has only made purchases from local tanning salons, with Yucatan and Danny Sheehan being the primary source. As the Court will recall, Yucatan and Sheehan have agreed to an injunction prohibiting them from reselling the Products outside the Yucatan tanning salon. Yet, S&L Vitamins has continued to obtain the Products and sell them on the internet, presumably from new sources.

Another issue in this lawsuit is that S&L Vitamins was shipping the Products to Europe even though the labels did not comply with the requirements for foreign distribution. At a prior status conference, it is counsel's recollection that S&L Vitamins' counsel represented to the Court that his client was no longer selling the Products in Europe.

In and around May, 2007, Australian Gold learned that S&L Vitamins had received a $100,000 order in Europe. This is a significant order in terms of dollars and quantity. It would take a single tanning salon several years to purchase this quantity of Product. Australian Gold submits that an order of this magnitude could only be fulfilled by an authorized distributor.

Upon learning this information, Australian Gold retained a private investigator to conduct surveillance on S&L Vitamins' activities. The surveillance revealed the following:

- S&L Vitamins received multiple UPS shipments each week. The deliveries appeared to be tanning lotions and other products (this contradicts the testimony in this case that S&L Vitamins picks up the Products from local tanning salons).

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- On at least two occasions, some of these boxes were immediately taken to another location in a van where they were loaded on pallets, wrapped in black plastic and shipped to Europe.

- Neither Sagarin nor Mercadente were ever observed going to a local tanning salon to pick up Products, which is directly contrary to their testimony.

These events call into question the veracity of the testimony of Sagarin and Mercadente and lead Australian Gold to believe that S&L Vitamins is obtaining its Product from sources other than those disclosed during discovery. Australian Gold believes that service of a simple subpoena *duces tecum* upon UPS for its shipping records will go a long way in determining if S&L Vitamins is acting contrary to its sworn testimony.

If S&L Vitamins is purchasing directly from Australian Gold's distributors, it would: (1) contradict S&L Vitamins' prior testimony and (2) bear directly on Australian Gold's tortious interference claim, which is fully submitted on summary judgment before Judge Seybert.

We have conferred with S&L Vitamins' counsel and informed him that we intend to notify the Court of these new events and ask that Australian Gold be allowed to issue a subpoena to UPS for S&L Vitamins' shipping records. Australian Gold, at this point, is not seeking any further discovery. Nevertheless, opposing counsel has objected despite the fact that allowing Australian Gold to issue the subpoena would not burden S&L Vitamins. Indeed, the mere fact that S&L Vitamins objects to the issuance of a third-party subpoena to UPS raises questions about S&L Vitamins' actions since the PARTIES' submission of summary judgment motions. If S&L Vitamins' is acting contrary to the sworn testimony in this case, then Australian Gold should be entitled to explore this issue, but UPS certainly will not release shipping information absent a subpoena.

Australian Gold therefore requests that the status conference not be adjourned because, in short, contrary to counsel for S&L Vitamins' representation in its letter of earlier today, the status of this case has changed.[1] Accordingly, Australian Gold respectfully requests that the Court address this issue at the conference on August 2, 2007.

Respectfully,

Francis J. Earley

Francis J. Earley

cc: Ronald Coleman, Esq. (via ECF)
Scott Matthews, Esq. (via ECF)

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[1] S&L Vitamins objected to the presentation of this issue to the Court at the August 2, 2007 conference based upon Local Rule 37.3(c). Australian Gold submits that with the submission of this letter, that the parties have substantially complied with the requirements of Local Rule 37.3(c) leaving no impediment to the issue being addressed at the already scheduled August 2nd conference.